



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

DEC 20 2010

John S. Miles  
William J. Olson, P.C.  
370 Maple Avenue West  
Suite 4  
Vienna, Virginia 22180-5615

RE: MUR 6296  
Campaign for Liberty

Dear Mr. Miles:

On May 26, 2010, the Federal Election Commission notified your client, Campaign for Liberty, of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended. On December 14, 2010, the Commission found, on the basis of the information in the complaint, and information provided by you, that there is no reason to believe Campaign for Liberty violated 2 U.S.C. § 441b. Accordingly, the Commission closed its file in this matter.

Documents related to the case will be placed on the public record within 30 days. See Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003) and Statement of Policy Regarding Placing First General Counsel's Reports on the Public Record, 74 Fed. Reg. 66,132 (Dec. 14, 2009). The Factual and Legal Analysis, which explains the Commission's finding, is enclosed for your information.

If you have any questions, please contact Elena Paoli, the attorney assigned to this matter at (202) 694-1548.

Sincerely,

A handwritten signature in black ink, appearing to read "Roy Q. Lockett".

Roy Q. Lockett  
Acting Assistant General Counsel

Enclosure  
Factual and Legal Analysis

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**FEDERAL ELECTION COMMISSION**

**FACTUAL AND LEGAL ANALYSIS**

**RESPONDENT: Campaign for Liberty MUR: 6296**

**I. GENERATION OF MATTER**

This matter was generated based by a complaint filed with the Federal Election Commission ("the Commission") by Charles R. Grice, Jr. *See* 2 U.S.C. § 437g(a)(1).

**II. FACTUAL AND LEGAL ANALYSIS**

**A. Factual Background**

Kenneth R. Buck is the Republican nominee for Senate in Colorado. His authorized committee is respondent Buck for Colorado and Kenneth Salazar, in his official capacity as treasurer ("Buck Committee" or the "Committee"). The complaint and supplemental complaint allege that around March 2009 or in the first half of 2009, Buck held interviews with prospective campaign consultants. Complaint at 3, Supplemental Complaint at 2. The complaint asserts that Buck was accompanied by Jerry Morgensen, the chairman of the board of Hensel Phelps Construction Co. ("Hensel Phelps") and a friend of Buck's. Hensel Phelps is a Greeley, Colorado, based construction company and federal government contractor. The complaint alleges that Buck informed the prospective consultants that Morgensen would contribute or spend up to or invest \$1 million or more on Buck's campaign, "presumably as an independent expenditure." Complaint at 3, Supplemental Complaint at 2. Further, the complaint maintains that Morgensen confirmed at the interviews that he was planning to "invest" \$1 million or more in connection with Buck's campaign. Complaint at 3. The supplemental complaint alleges that thereafter, pursuant to Buck's instructions, at least \$1 million has been contributed by Hensel

1 Phelps employees and/or Morgensen and “funnelled” by Morgensen and/or Hensel Phelps and  
2 other individuals to several 501(c) non-profit corporations, including Campaign for Liberty  
3 (“CFL”). Supplemental Complaint at 2; *see also* Complaint at 3.

4 The complaint and its supplement further allege that the funds were then used by CFL to  
5 disseminate advertisements supporting Buck and opposing other candidates. *Id.* Specifically,  
6 the complaint alleges that in January 2010, CFL aired a television ad attacking one of Buck’s  
7 primary opponents that reportedly cost \$329,000. Complaint at 3, Complaint Exh. J.

8 The complaint argues that CFL paid for the advertisements with “excessive”  
9 contributions from Buck supporters who had already reached the individual contribution limit  
10 with direct contributions to Buck’s campaign. Complaint at 3-4. The complaint alleges that  
11 Morgensen and/or Hensel Phelps funnelled these “contributions” from Buck supporters to CFL,  
12 “intending to benefit Buck.” Complaint at 3. The complaint further alleges “upon information  
13 and belief” that Buck advised Morgensen and/or other contributors to make “excessive  
14 contributions” to CFL. *Id.* The complaint argues that Hensel Phelps’ effort to “funnel”  
15 contributions to CFL resulted in illegal coordination, excessive in-kind contributions, and  
16 prohibited corporate and government contractor contributions.

17 Buck and the Committee state that the complaint makes many conclusory allegations but  
18 contains no facts. Specifically, Buck and the Committee state that “they have not cooperated  
19 with, consulted with, acted in concert with, requested, or suggested that ... Campaign for Liberty  
20 ... or any of their employees, officers, directors, or agents make any public communications  
21 supporting Buck’s candidacy.”

22 CFL states that it ran an issue ad, which complimented Buck for completing a survey  
23 form sent to all Colorado candidates, with no involvement of anyone mentioned in the complaint.

1 CFL Response, Affidavit of President John Tate, ¶¶ 4, 6. CFL also maintains that it did not  
2 communicate with the Buck campaign or anyone known to be associated with it prior to running  
3 the ad, and it created, produced, and ran the ad independent of any candidate or political party.  
4 *Id.*, ¶ 6. Morgensen states that he has not been involved in any financial transaction with CFL.

5 **B. Analysis**

6 The complaint alleges that many Hensel Phelps employees, Morgensen, and/or other  
7 Buck supporters made contributions to Ken Buck's campaign up to permissible limits then made  
8 "excessive" donations to CFL so that CFL could produce and disseminate advertisements in  
9 support of Buck, or attacking his opponents. The complaint suggests that Buck and his  
10 committee engaged in coordinated activity with Morgensen to accomplish this plan.

11 Under the Act, corporations are prohibited from making any federal political  
12 contributions. 2 U.S.C. § 441b.

13 The issue is whether the advertisements paid for by CFL were independent expenditures,  
14 or were coordinated with Buck and thereby, resulted in prohibited contributions. The Act  
15 defines in-kind contributions as, *inter alia*, expenditures by any person "in cooperation,  
16 consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized  
17 political committees, or their agents . . . ." 2 U.S.C. § 441a(a)(7)(B)(i). The Commission's  
18 regulations provide a three-prong test to determine whether a communication is coordinated. All  
19 three prongs of the test must be satisfied to support a conclusion that coordinated communication  
20 occurred. *See* 11 C.F.R. § 109.21(a).

21 The first prong of the test provides that the communication must be paid for by a person  
22 other than the Federal candidate, the candidate's authorized committee, political party  
23 committee, or any agent of the foregoing. 11 C.F.R. § 109.21(a)(1). For purposes of a

1 coordination analysis, "agent" is defined as, "any person who has actual authority, either express  
2 or implied, to engage in [certain activities set forth below, *inter alia*]." 11 C.F.R. § 109.3(a).  
3 Here, the payment prong is met as CFL paid for the advertisements at issue. The content prong  
4 need not be decided because the conduct prong does not appear to be satisfied.<sup>1</sup>

5 The conduct prong of the coordination test requires that the parties have engaged in  
6 conduct that meets any of the following standards: (1) the communication is created, produced or  
7 distributed at the request or suggestion or assent of a candidate, his authorized committee, or an  
8 agent of the foregoing; (2) the candidate, authorized committee, or agent is materially involved  
9 in decisions regarding the content, intended audience, means or mode of communication;  
10 (3) there is substantial discussion about the communication between the person paying for the  
11 communication and the candidate, the authorized committee, or an agent; (4) the person paying  
12 for the communication and the campaign share common vendors; or (5) the communication is  
13 paid for by a person or by the employer of a person who was an employee or independent  
14 contractor of the candidate or candidate's committee. 11 C.F.R. § 109.21(d)(2)-(5).

15 The complaint's allegations regarding CFL fail to satisfy the conduct prong. At most, the  
16 complaint alleges that "upon information and belief" Buck and/or Morgenserr informed Buck  
17 supporters to make donations to CFL. Buck states that he has not cooperated with, consulted  
18 with, acted in concert with, requested, or suggested that CFL or any of its employees, officers,  
19 directors, or agents make any public communication supporting his candidacy. In addition, CFL

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<sup>1</sup> The content standard requires that the communication be either an electioneering communication, a public communication that disseminates, distributes, or republishes campaign materials, a public communication that expressly advocates, or a public communication that refers to a Senate candidate in the relevant jurisdiction 90 days or fewer before the election. 11 C.F.R. § 109.21(c). It appears that the ads in this case were disseminated more than 90 days before the August 10, 2010, Colorado primary election; thus, the only relevant content standard would be an express advocacy public communication.

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1 specifically states that it did not communicate with Buck or anyone from his campaign regarding  
2 the ads.

3 Given the complaint's lack of facts regarding Buck's conduct, Buck's statement that he  
4 was not involved with the communications at issue, and CFL's specific, definitive response that  
5 it had no contact with Buck, his Committee or anyone known to be associated with Buck, there is  
6 not enough information to find that the advertisements were coordinated.

7 Moreover, in order to find coordination based on Morgensen's actions, the facts alleged  
8 would need to establish that Morgensen was Buck's or the Committee's agent. The complaint  
9 does not allege any facts to suggest that Morgensen was acting as the agent of either. Thus,  
10 Morgensen's actions, if any, appear to be independent of Buck and are not relevant to a  
11 coordination analysis.

12 In sum, even if Morgensen solicited donations to CFL so that it would disseminate pro-  
13 Buck materials, there would not be a reason to believe the Act had been violated absent  
14 allegations or information connecting Morgensen to Buck or the Committee. The complaint and  
15 supplemental complaint, however, do not allege sufficient facts indicating that Morgensen was  
16 an agent of Buck's or even worked on his campaign; thus, there is no information tying Buck and  
17 his Committee to the communications disseminated by CFL.

18 Therefore, the Commission has determined to find no reason to believe that Campaign for  
19 Liberty violated 2 U.S.C. § 441b by making prohibited in-kind corporate contributions in the  
20 form of coordinated communications.